NO.72598-5

SUPREME COURT OF THE STATE OF WASHINGTON

JESSICA BRAAM, et al.

Respondents,

v.

STATE OF WASHINGTON, and the DEPARTMENT OF SOCIAL AND HEALTH SERVICES, et al.,

Appellants.

BRIEF OF APPELLANTS

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I. INTRODUCTION

This case challenges the constitutionality of Washington's foster care program.

The named plaintiffs are current and former foster children. All were abandoned, abused or neglected by their birth parents. The Department of Social and Health Services (DSHS or Department), through its Child Protective Services, investigated their familial circumstances, removed them from their abusive or neglectful situations and, pursuant to juvenile court order, accepted the transfer of legal custody from the parents to the Department. Plaintiffs were then cared for in the foster care system—placed with foster families either by DSHS or a private child-placing agency. They assert that the foster care system has failed them and others like them, and they provided testimony about specific incidents in their own experiences, most of which occurred many years ago. Based on this limited historical record, and the opinions of some who have worked within the system and are aware of its limitations and imperfections, plaintiffs asked the court below to order systemic changes in the foster care system, specifically as it relates to children who have experienced three or more foster care placements.

Proceeding on a flawed framework of constitutional jurisprudence that analogized foster care to the confinement and deprivations of liberty suffered by involuntarily committed, the trial court personally undertook the task of "fixing" the foster care system. The "fix" is a sweeping mandatory injunction that is not anchored in constitutional principles, is

not supported by the factual record, and goes well beyond any measures necessary to comply with constitutional requirements. As a result, if allowed to stand, the trial court's injunction would introduce a new era of judicial intervention by state courts into decisions that are, by constitutional design and historic practice, consigned to the purview of the legislative and executive branches of government.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the Injunction on May 31, 2002. CP142-54.[1] A copy of the trial court's Injunction is included in the Appendix at A-1 through A-13.

2. To the extent the "Findings" set forth in the Injunction are findings of fact, the trial court erred in entering each of the five Findings. To the extent the Findings are conclusions of law, the trial court erred in entering each of the Findings as a conclusion of law. The challenged Findings are included in the Appendix at A-2.

3. The trial court erred in denying Defendants' Motion for Partial Summary Judgment Re: Substantive Due Process on August 27, 2001. CP 1924-25.

4. The trial court erred in its instructions to the jury by misstating the law, erroneously describing the purported constitutional right and culpability standard, and by asking the jury to make findings of past,

[1] The complete pagination of the Clerk's Papers is not available as this Brief is being prepared. To the extent possible, the Brief relies on an initial Index to Clerk's Papers when citing to the Clerk's Papers. However, citation to the some of the Clerk's Papers is to the clerk's document sub-number (DSN), followed by additional descriptive information when necessary or appropriate.

rather than current, violations and harm. CP 743-58. Specifically, the trial court erred in giving Instructions Nos. 7, 8, 9, 10 and 12, and the Verdict Form, CP 738. A copy of the Courts Instructions to the Jury are included in the Appendix at A-14 through A-29. A copy of the Verdict Form is in the Appendix at A-30.

5. The trial court erred in failing to ask the jury to make specific findings with respect to any harm suffered by each of the named plaintiffs. RP 3164.

6. The trial court erred in admitting testimony about alleged inadequacies of the state's foster care system that occurred many years ago. CP 961-66; RP 140-42, 570-78, 1576-79, 1633, 1662-64, 1996.

7. The trial court erred in granting plaintiffs' motion in limine, prohibiting the state from offering evidence that Washington meets or exceeds the standards and practices used by foster care systems in other states. CP 949-52; RP 170-73 (Order entered on October 30, 2001).

8. The trial court erred in admitting, over defendants' objections:

(a) Testimony about aspirational standards for foster care systems adopted by the Child Welfare League of America. RP 166-73.

(b) Testimony describing policy statements from the American Academy of Pediatricians that purport to establish the professional standards of practice for pediatricians providing care to foster children and about whether Washington's foster care system met the

standards of the American Academy of Pediatricians. RP 2197-03, 2208-11, 2227-29, 2234-37, 2239-49, 2261.

(c) Testimony about statements contained in reports from the Office of Family and Children's Ombudsman, notwithstanding that such statements are hearsay, had no factual relationship to the class or its representatives, and are privileged under the provisions of RCW chapter 43.06A. CP 961-66; RP 59-61. A copy of RCW chapter 43.06A is included in the Appendix at A-31 to A-32.

(d) Testimony that various alleged "practices" violated some undefined standard of care, absent testimony that this purported standard of care was accepted, let alone actually practiced, by any child welfare system. RP 1707-09.

9. The trial court erred in certifying the plaintiff class on July 30, 2001. DSN 202.

10. The trial court erred in failing to grant defendants' post-trial Motion to Revise the Class Definition. CP 621-30 (No Order entered).

11. The trial court erred in denying defendants' Motion to Dismiss Adult Plaintiffs as class representatives. CP 2359-61 (Order entered June 29, 2001).

III. ISSUES

1. Children are judicially removed from their parents' custody because they have been battered, abused or neglected by their parents. Does the juvenile court's transfer of legal custody from the abusive or

neglectful parents to the Department and the subsequent placement of a child in three foster homes trigger a "liberty interest" protected by the substantive due process clause of the 14th Amendment to the United States Constitution? (Assignments of Error 1, 2, 3, 4.)

2. If any such liberty interest is implicated by the transfer of a child's legal custody from an abusive or neglectful parent to the state, did the trial court err in describing the interest as a fundamental right "to be treated in a manner which does not substantially depart from professional judgment, standards or practice"? (Assignments of Error 1, 2, 3, 4.)

3. If a fundamental liberty interest is implicated by the state's acceptance of a child's custody and the child's subsequent placement in three foster homes, does the standard for proving a violation of any substantive due process right require plaintiffs to show that state employees acted with deliberate indifference toward the rights of foster children in the class? (Assignments of Error 1, 2, 3, 4.)

4. Did the trial court abuse its discretion in basing a system-wide mandatory injunction on the jury's limited finding of non-specific past harm, rather than existing or threatened harm to a named plaintiff and widespread actual harm to the class? (Assignments of Error 1, 4, 5, 6, 7, 8, 11).

5. Did the trial court abuse its discretion and exceed its authority in entering a mandatory Injunction ordering DSHS, as well as non-parties, to fund, change, modify or adopt specific social welfare policies? (Assignments of Error 1, 2.)

6. Did the trial court err in evidentiary rulings: (a) prohibiting defendants from offering testimony that Washington's foster care system meets or exceeds the standards and practices of other states; (b) admitting testimony about the aspirational goals described by the Child Welfare League of America; (c) admitting testimony about the purported standards of the American Academy of Pediatricians for practice by pediatricians who treat foster care children and allowing opinion testimony to the effect that Washington does not meet the standards purportedly adopted by the American Academy of Pediatricians; (d) admitting testimony about reports prepared by the state Office of Family and Children's Ombudsman, and admitting those report(s) into evidence, notwithstanding such reports are hearsay, had no factual relationship to the class and are privileged under the provisions of RCW chapter 43.06A; (e) admitting testimony that various alleged "practices" of DSHS violated some undefined standard of care? (Assignments of Error 7 and 8.)

7. Did the trial court abuse its discretion in initially certifying the class and in defining the class as foster children who have or will be placed in three placements without plaintiffs first having clearly articulated their claims, and in light of evidence showing that the experiences of the named plaintiffs were not typical of foster children in the proposed class? (Assignment of Error 9.)

8. Did the trial court err in refusing to dismiss the adult plaintiffs who purport to represent the class, but who individually do not have standing to pursue the claims alleged? (Assignment of Error 11.)

9. Did the trial court abuse its discretion in failing to adjust the class definition to conform to the evidence of plaintiffs' experts who testified that the number of placements is not the critical factor in foster children's well-being and that, at minimum, it was only after five placements that multiple placements become a factor in predicting a foster child's degree of success? (Assignment of Error 10.)

IV. STATEMENT OF THE CASE

A. Introduction.

Washi child welfare system is composed of the juvenile courts and their related services, state and local social service agencies and providers, public and private attorneys, foster parents, private agencies, medical providers, educators, and tribes. It is designed to provide children in foster care with numerous protections – both individual and systemic. It is undisputed that for the vast majority of children, these protections keep them safe, well cared for, and in stable placements until they can return home or until an alternative permanent home can be found. *See, e.g.,* RP 733-38, 1296-98, 1303-04, 1616-20, 2036-38, 2786-90.

Every child in long-term foster care is the subject of a juvenile court proceeding and, consequently, of judicial oversight. *See, e.g.,* RCW 13.34.110 (dependency fact-finding hearings); RCW 13.34.138 (dependency review hearings). An individualized service plan and social study, including review of the child's placement, is developed for each child and is updated and reviewed by the court at least once every six months. RCW 13.34.120; RCW 13.34.138; RCW 74.13.065; 42 U.S.C.

§ 671(a)(16). Each child has the right to a court-appointed attorney and/or guardian ad litem who independently investigates the child's welfare and reports to the court at least once every six months. RCW 13.34.100 and RCW 13.34.105. The parents of each dependent child are offered services to help them correct the problems or parenting deficiencies that resulted in the child's removal from the family home. RCW 13.34.130 and RCW 13.34.138.

The system itself is subject to a network of federal and state laws and regulations that establishes the framework for providing child welfare services. These federal and state laws establish time frames for moving children out of the system and either back to their own homes or to another permanent placement. *See, e.g.,* RCW 13.34.145 (permanency plans must be developed); 42 U.S.C. § 675(5)(E). They provide the basis for services to children who are in foster care because they are victims of abuse or neglect at the hands of their parents.

Some of the state statutes that are pertinent to this appeal, and that impact the child welfare and foster care system, are included in RCW 13.32A (family reconciliation services); RCW 13.34 (dependency and termination); RCW 13.50 (juvenile records); RCW 43.20A (creating the Department of Social and Health Services); RCW 74.13 (child welfare and foster care services); RCW 74.14A and RCW 74.14B (children and family services); and RCW 74.15 (licensing of child placing agencies, including foster homes and group homes).

These statutes, and the Washington Administrative Code (WAC) regulations that govern their administration, currently are the principal standards governing the Department's role in the foster care system. Also important are the budgeting and accounting act, RCW 43.88, and the Taxpayer Protection Act (Initiative 601), RCW 43.135, which limit the legislative and executive branches' abilities to fund government programs.

The trial court in this case dismissed all of the plaintiffs' claims alleging statutory and regulatory violations. CP 904-07.

B. Procedural History.

Plaintiffs filed their initial complaint on August 10, 1998, seeking compensatory damages on tort theories. CP 4171-78. On April 3, 2000 they filed a Second Amended Complaint, CP 4140-48, which in addition to the tort recoveries, sought injunctive relief on behalf of a class, later certified as "[a]ll children who are now (or who in the future will be) in the custody of the Department of Health and Social Services [sic] foster care system and who while in DSHS custody are placed by the Defendants in three or more placements." DSN 202. The tort claims of the 13 original plaintiffs were resolved before trial and, as part of a settlement, the plaintiffs agreed not to further oppose empanelling a jury to decide the facts of plaintiffs' claims for injunctive relief. CP 266.

The class claim for injunctive relief turned on their asserted constitutional and general statutory rights, which plaintiffs initially characterized as a right to stable and permanent homes. CP 4142. The

bulk of the relief initially sought by the plaintiff class in its Second Amended Complaint consisted of additional procedural requirements to be implemented before foster care placements could be changed.[2] *Id.*

On June 1, 2001, the court granted DSHS's motion to dismiss plaintiffs' procedural due process claims. CP 3053-56. Other claims based on state and federal statutes or the state constitution were likewise dismissed. CP 904-07, 1465-67. The Department's subsequent motion to dismiss all claims for injunctive relief was denied, with the court finding that the Second Amended Complaint included an allegation of a substantive due process violation. CP 1972-73. The Department's motion for summary judgment dismissing plaintiffs' substantive due process claims was denied on August 27, 2001. CP 1924-25.

As a result of the various motions and orders, the case went to the jury solely on the issue of whether the state's administration of the foster care system violated the class members' substantive due process liberty interests to an extent that injunctive relief was justified and warranted. What was unclear, and remained unclear until after both parties had rested,

[2] Though these procedural due process claims were ultimately dismissed, the fact that plaintiffs sought them in the first place reflects their skewed understanding of the dynamics of foster care placements. Many changes in foster care placements occur because of changes in the lives of the foster parents—change of job, illness, divorce, etc.—or because the particular placement is too disruptive on the lives of the other children residing in the home. Foster parents are essentially volunteers. They are unpaid and only receive reimbursements for the costs incurred in taking care of the foster child. The suggestion that foster children are entitled to a hearing before a placement is changed is predicated on the belief that the child placement agency—DSHS or a private entity—can compel foster parents to continue a placement against their will, a notion that is neither legally nor practically sound.

was the nature and contours of the constitutionally protected right that plaintiffs were asserting.

Prior to trial the court proposed a set of jury instructions that included an instruction describing the liberty interest involved as a fundamental right to a "safe, stable and permanent home." CP 260, at Ex. I, Instruction C-5. Another proposed instruction stated that in order to prove a violation of this right, plaintiffs must show that Department was "deliberately indifferent" to the plaintiffs' constitutional rights. *Id.* at Instruction C-9. Before the jury had begun receiving evidence, plaintiffs convinced the court to redefine the culpability standard so that a constitutional violation could be proven by showing that the Department's actions "substantially departed from professional judgment, standards and practice."[3] RP 182-216.

After plaintiffs presented their case-in-chief, the trial court granted defendants' motions for judgment as a matter of law pursuant to CR 50 by: (1) dismissing claims based on 42 U.S.C. § 675 and RCW 13.34.020; (2) dismissing all claims, including those for injunctive relief, against the sole individually named defendant, a former DSHS Secretary; and

[3] This formulation was drawn by analogy from *Youngberg v. Romeo*, 457 U. S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982), where the Supreme Court held that an involuntarily committed profoundly mentally retarded person had "constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests." *Youngberg,* 457 U.S. at 324. The Court also held that "liability may be imposed only when the decision by the professional [in selecting the training] is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Youngberg,* 457 U.S. at 323.

(3) dismissing as class representatives three named plaintiffs about whom no testimony was presented. The balance of the CR 50 motion was denied. CP 842-44; RP 2523-52.

After both parties had rested, plaintiffs surprised both the state and the court, by acknowledging that instructing the jury that there is a substantive due process right to a "safe, stable and permanent home" would be reversible error. RP 3072. Rather, plaintiffs indicated "[w]e think the right is to adequate treatment as set forth in the *Youngberg* case." *Id.* The court ultimately instructed the jury that they should rule for the plaintiffs if they found that DSHS had violated the class members' constitutional right "to be treated in a manner which does not substantially depart from professional judgment, standards or practice." RP 3092-93; CP 752, App. A-23. The jury verdict form asked the jury to make two findings upon which an injunction might be based. CP 738, App. A-30. The jury returned a verdict for the plaintiffs on December 4, 2001. *Id*.

Nearly two months later, on January 31, 2001, plaintiffs filed a proposed "memorandum opinion" and injunction. CP 657-96. On March 12, 2002, the state filed an objection to the issuance of any injunction, and a particularized objection to the injunction proposed by plaintiffs. CP 260-507. At the same time, the state moved to revise the class definition, CP 621-30, and for a stay of any injunction pending appeal. CP 496-98. While no order was entered, the court declined to revise the class, and the motion for a stay was denied, CP 155-56.

On May 31, 2002, the court entered its Injunction. CP 142-54. Finding that "the plaintiff class is being harmed by certain current practices, actions and omissions of the defendants," the court entered a sweeping order requiring more than a dozen changes in the current operation of the foster care system[4].

C. Evidence Presented To The Court In This Case.

The Injunction issued in this case was atypical in that it was not predicated on a series of findings by the trial court. Rather the case was tried to a jury which was asked to reach a general verdict on whether the state's conduct had denied the plaintiff class members' *constitutional* right "to be treated in a manner which does not substantially depart from professional judgment, standards or practice" and that, as a result, the class members had been harmed. CP 752, App. A-23. The following summary of the evidence establishes the context in which this Court must resolve the issues this case presents.

1. Plaintiffs' Evidence.

Plaintiffs' evidence can be catalogued into three parts. The first is the testimony of and about the class representatives.[5] While the individual

[4] An item by item listing of the provisions of the trial court's order, along with pertinent provisions of current law in each area that it addresses, and the estimated additional cost of complying with each item, is in the Appendix at A-33 to A-41. The cost information is taken from the Declaration of Virginia Heim, submitted in support of the Department's Opposition to Entry of Plaintiffs' Proposed Opinion and Injunction. CP 499-504.

[5] As noted above, there was no testimony about three of the original 13 named plaintiffs, and they were dismissed as class representatives. CP 842-44 (Order Granting/Denying CR 50 Motion). Three others—Amie Anderson, Beth Hardin and Eryk Hardin—turned 18 prior to trial, and thus are no longer eligible to be placed in

circumstances of each varied, there were some common elements of their histories, as the following summaries indicate.

a. Testimony About Class Representatives.

Amie Anderson was born on December 12, 1981. RP 343, 419. She entered foster care in March 1985 when she was three years old. RP 344, 347, 419-20. She was removed from her biological parents' care because she had been repeatedly sexually abused by her father, not protected by her mother, and neglected. RP 420-25; Ex. 17. Prior to removal, Amie was regarded as developmentally delayed, violent to others, and depressed. *Id.* *See also* RP 436-37.

Psychological assessments and counseling were provided to Amie both initially and throughout her dependency. RP 372-73, 430-32, 440-47. The professionals uniformly concluded Amie's behavioral problems and difficulties in forming attachments with others stemmed from the abuse and neglect inflicted by her biological parents. *Id.* *See also* RP 462 (wherein Amie admits she could not bond "since day one.").

Amie was initially placed in foster care through a private child placing agency, Lutheran Social Services. RP 438-40; Ex. 24. She remained in her first foster home for more than a year, until her foster mother's failing health forced a change in placement. RP 433, 436-37. In her second foster home, she had to go into respite placements twice while

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foster care. The state's motion to exclude their testimony and dismiss them as plaintiffs was denied. CP 2359-61. Thus the jury only heard from seven children of the approximately 10,000 children currently being cared for in the foster care system.

her foster father had surgery. RP 433-34. That placement ultimately ended when her foster parents moved due to a job transfer. *Id.*

Amie had a biological brother about two years older than she. RP 425. She was separated from her sibling because he had not been abused like she had, so no dependency was filed as to him and he was not placed in foster care. RP 426. Also, her biological parents and brother moved away shortly after Amie entered foster care. *Id.*

Before parental rights were terminated in May 1988, Amie was placed in her first prospective adoptive home. RP 447-49, 451-52. She resided there for about three years, although she had a few in-patient psychiatric hospitalizations and group home placements to provide more intensive treatment during that time. *Id.* This potential adoptive placement ended when Amie asked to leave. RP 448, 454-56.

Amie was placed with a second prospective adoptive family following another psychiatric hospitalization and transitional group home placement. RP 456-57. After eight months, the family requested that Amie be moved. RP 459-60.

Two short-term placements occurred before a third prospective adopting family could be found. RP 460. After a few months, this third adoptive family also asked to have Amie moved. RP 461.

Amie then had several short-term placements while waiting for the Haynes family to obtain a foster care license. RP 463. The Haynes ultimately became Amie's legal guardians. RP 482-83. This placement

change, as well as all her others, were reviewed by the juvenile court at least every six months. RP 467-70; Ex. 10.

Amie graduated from high school with a 3.7 grade point average, although she had two special education classes. RP 484. She has not felt the need for, nor received, any mental health therapy since age 17. RP 484-85. She is married and plans to attend college. RP 412-13, 486-89. She is now 20 years old, never used drugs or alcohol, and has no criminal record. RP 489. According to Amie, "if you looked at me you wouldn't know I was a foster kid." *Id.*

Jessica Braam was born on October 15, 1986. RP 2107. She entered foster care in March 1991 when she was four years old. *Id.* She was removed from her biological parents' care because they were chronic alcoholics who severely abused and neglected her. RP 2109-12; Ex. 224. She was sexually abused by her father who also broke her clavicle. RP 2111. She had multiple residences prior to removal due to her mother's transient lifestyle. RP 2109. At the time of removal, she was deemed to have emotional and psychological problems due to her parents' mistreatment. RP 2110.

Psychological assessments and therapy were provided to Jessica at state expense both initially and throughout her dependency and adoption. RP 2102, 2118-20, 2134-38, 2152-53, 2165-68. These professionals uniformly concluded Jessica's problems were either inherited or stemmed from the abuse and neglect of her biological parents. *Id.*

Jessica has a sister nine years older than she is. RP 2113. They were both removed from their biological parents care at the same time and placed in the same foster home. RP 2112-13. After eight months, the foster parents requested removal of Jessica's sister. *Id.* Rather than separate the siblings, both were moved to another foster home where they resided until the foster parents moved to Hawaii and the court ordered reunification of the girls with their biological mother. RP 2113-16; Ex. 228. The court-ordered reunification was short-lived, resulting in a five-day receiving home placement before Jessica was placed with the Braams on October 27, 1992. RP 2118, 2120-21; Exs. 227, 228. Jessica's sister was also placed with the Braams. RP 2114.

Parental rights were terminated on January 19, 1994. RP 2138-39; Ex. 230. However, the biological father unsuccessfully appealed the termination ruling, which resulted in Jessica not being legally free for adoption until July 1995. RP 2144; Ex. 68.

The Braams adopted Jessica on October 15, 1995, three years after she began residing in their home. RP 2151; Ex. 232. They also adopted Jessica's sister, and became guardians of the sister's recently born child. RP 2156. After the adoption, the Braams ceased being foster parents and let their license lapse. RP 2155.

Three years later, when Jessica was almost 12 years old, she was discovered to be a brittle diabetic. *Id.* This discovery resulted in an emergency hospitalization, followed by a psychiatric hospitalization, a group home placement, then a therapeutic foster home. RP 2159-62. The

foster home asked to have Jessica moved due to the complexities of dealing with the combination of her diabetes and behavioral problems. RP 2162-63. This request resulted in one-night receiving home placement until another therapeutic foster home was found. RP 2168. Jessica resided there for six months until she was placed in a group home in Yakima, which her adoptive mother regards as the best possible placement for Jessica. RP 2168, 2172. Jessica was 15 years old and residing in the Yakima group home at the time of trial, with the plan being to eventually return her to the Braams' home. RP 2099, 2171-72.

Jenneiva Bursch was born on May 8, 1984, and her sister, **Cassidee**, was born on January 1, 1986. RP 2297. Both girls were born mentally retarded, from mentally retarded parents. RP 2294-97. They were both severely neglected and sexually abused at their parents' home. RP 2294-95. They were removed from their parents' care in December 1989, when Jenneiva was five and one-half years old and Cassidee was almost four. RP 2297-98. Both girls had reactive attachment disorder before they entered foster care. RP 2298-99. Both girls received psychological therapy throughout their dependencies and adoptions. RP 2306.

Both were initially placed in a foster home for six months before being placed with Gene and Reva Bursch in 1990. RP 2302. They then went to live with the Bursch's son, Greg, and his wife Sherri. *Id.* After the biological parents' rights were terminated in March 1992, Greg and Sherri Bursch adopted the girls in September 1993. RP 2301-03; Exs.

261, 262. When Greg and Sherri divorced, the girls returned to their adoptive grandparents' home in July 1996, where they remained until shortly before trial. RP 2303-04. At the time of trial, both girls had just been moved to a foster home due to the failing health of their adoptive grandparents. RP 2304-05. Both girls were doing well and were happy in their new foster home. *Id.*

Beth, Eryk, Ivory and **Eboney Hardin** were born on the following dates: Beth, October 31, 1981; Eryk, July 10, 1983; Ivory, December 21, 1984; Eboney, July 14, 1986. RP 961-63; Ex. 102. Beth and Eryk Hardin were both over age 18 at the time of trial and no longer eligible for foster care.

Dependency petitions were filed on behalf of all four Hardin children in August 1982, when they ranged in age from three to seven years old. RP 964; Ex. 103. They were removed from their biological parents' care because they had been severely neglected, physically abused, and sexually abused. RP 964-68. Their mother was a prostitute and heroin addict who essentially abandoned her children after she was released from jail. RP 972-73. The children had a transient lifestyle with their father, living in homeless shelters and parks. RP 966, 972; Ex. 103.

There is no dispute DSHS worked hard to keep this sibling group together. RP 1013-14; Ex. 109 at 2. Beth and Eryk were placed with the Hardins in January 1990. RP 961-63; Ex. 102. The Hardins were reluctant to have the two younger girls join them due to their destructive behaviors, but later agreed. RP 997-99. Ivory was then placed with the

Hardins in October 1990. RP 961-63; Ex. 102. However, to accommodate Eboney, the Hardins had to move to a larger home, which allowed Eboney to be placed with them in June 1991. RP 998-99; Ex. 102.

Parental rights were terminated in January 1992. Ex. 102. All four children had severe behavioral problems due to their biological parents' lack of control, safety, and stability. RP 970-71, 977-78, 1076; Exs. 104, 107, 138. All four were diagnosed with reactive attachment disorder. RP 1032. To treat these problems, over $500,000 in care and services were provided while the children were with the Hardins. RP 891-92, 1050-51, 1113-14.

The Hardins became the children's guardians in May 1992. RP 961-62; Ex. 102. All four were adopted by the Hardins in August 1996. *Id.* Due to numerous psychiatric hospitalizations, juvenile detentions, and runaways, all four experienced multiple placements, the bulk of which occurred following their placements with the Hardins. *See, e.g.*, RP 862-64, 988-89, 1060-66, 1072-75, 1091-94, 1100-03; Exs. 129, 130, 131, 132, 136, 137, 138, 139.

Tim Olson was born on March 15, 1990. RP 2284. He was chronically neglected by his biological parents and sexually abused by his father. RP 2285, 2287; Exs. 252, 253, 254. He was initially removed from their care when he was six months old, then was reunified with his mother a few times before parental rights were ultimately terminated in 1993. RP 2286-88. Following termination of parental rights, Tim and his

brother had a stable foster home until Tim was placed with the Olsons for adoption. *See* RP 2289. The brothers ultimately were separated because Tim's older brother was physically abusive, including urinating and defecating on Tim. *See* RP 2289, 2324.

Tim developed reactive attachment disorder when he was about one year old. RP 2288. He received mental health treatment throughout his dependency and adoption. RP 2290.

The biological parents' rights were terminated in February and March 1993. RP 2287-88; Exs. 253-54. He was placed with the Olsons in August 1993, who adopted him in July 1994. RP 2289-90; Ex. 255.

At the time of trial, Tim continued to reside with his adoptive father. RP 2291. He was functioning reasonably well, doing okay in school, and had not been in trouble with the law. RP 2291-94.

Shaun Sanchez was born on September 13, 1988 to his 15 year-old mother. RP 2264, 2266; Ex. 245. He entered foster care in January 1992 when he was about three and half years old. RP 2265. Shaun's father has been in prison almost all of Shaun's life. RP 2266-67. Shaun had a transient lifestyle with his mother and was often homeless. RP 2267. He was removed from his mother's care due to severe neglect and physical abuse, including giving him alcohol and drugs. RP 2266-71. The mother abandoned Shaun with a babysitter on Christmas day in 1991. RP 2271; Ex. 246.

Shaun was initially placed with his grandmother who later requested that he be moved because the biological mother's gang member

friends were threatening her. RP 2268-69, 2272. Parental rights were terminated in 1994. RP 2271-72. Shaun had four foster care placements over the ensuing years, including one unsuccessful prospective adoptive placement. RP 2272-73. He has remained in his fifth foster home since 1997, but is unwilling to be adopted. RP 2273, 2284.

Shaun was diagnosed as was having suffered reactive attachment disorder by age two. RP 2265. He received significant amounts of mental health therapy throughout his dependency. RP 2273-77. At the time of trial, Shaun was functioning like a relatively normal 12-year-old. RP 2273, 2280-81.

In summary, each of the plaintiff class representatives was abandoned, abused or neglected by his or her parents, declared dependent by the juvenile court having jurisdiction, and placed in foster care either by DSHS or by a private child-placement agency. Each was severely traumatized, emotionally, mentally or in some cases physically, by the experiences with their biological families, and the residual effect of these experiences affected their experiences in foster care. All exhibited severe emotional and behavioral problems before entering foster care.[6] Each was placed with several foster homes, with the period of placement ranging from a few days to many years. With one exception, they ultimately achieved permanency, either through adoption or permanent

[6] While some of the class representatives testified about sexual or physical abuse at the hand of foster parents or other caregivers, the trial court agreed that there was no evidence that DSHS knowingly placed any foster child into a home where he or she was at risk of harm, and gave the jury a cautionary instruction regarding such testimony. RP 778-79.

guardianships. The exception was Shaun Sanchez, who declined to be adopted.

b. Testimony Describing Purported "Standards" for Foster Care.

The second component of plaintiffs' testimony consisted of the descriptions of aspirational goals for foster care developed by the Child Welfare League of America, a national non-profit child advocacy organization, and standards purportedly adopted by the American Academy of Pediatricians for pediatric practice with foster children.[7] Other witnesses were allowed to opine, over the state's objections, that various alleged practices violated some undefined standard of care, even though there was no showing that these standards had been adopted by any state, or, for that matter, even written down. *See, e.g.,* RP 1707-09.

c. Testimony from Workers in Foster Care System.

Finally, the jury heard observations of several individuals who have worked in the foster care system, both now and in past years, either for DSHS or for other agencies involved in the child welfare system, or have studied foster care systems generally. While each described problems that the foster care system has faced in the past, and offered

[7] *See e.g.*, RP 751-53, 1400-02, 1458, 1472-73, 1502-04, 1533, 1572, 1600-04, 2197-203, 2208-211, 2229, 2234-37, 2239-49, 3022. Initially defendants were prohibited from asking whether any state met these standards. RP 751-2, 1533. Later the court reversed itself, RP 1572, and the answer was that no state had adopted or came close to meeting these aspirational standards. RP 1600. Nonetheless, ongoing references to these standards led the jury to conclude, given the court's instruction and the exclusion of testimony about how Washington compared to other states' standards and practices, that these were in fact the standards against which the Department's administration of the foster care system were to be judged.

opinions about how it could be improved, they were in agreement with the state on several key points that are essentially undisputed. They include at least the following:

- Washington's foster care system works well for the vast majority of the children who enter care. *See, e.g.,* RP 733-78; 1303-04, 1339-43, 1591-96, 1616-20, 2031-33, 2036-38, 2395-2400, 2622-23, 2725-33, 2786-90; Exs. 50, 176, 179.

- The Legislature has funded and the Department has implemented numerous improvements to the state's foster care system in recent years. RP 563-64, 749-50, 1511-16, 1531-32, 1550-52, 1554-59, 1561-62, 1600, 2015-17; 2030-31, 2341-42, 2362-64, 2376-80, 2385-90, 2394-98, 2638-69, 2690-2703, 2739-43, 2772-74, 2786-89, 2896-2905; Exs. 44, 45, 46. *See also* RCW 74.13.285; RCW 74.14A.050(4)-(7).

- The length of time that a child is in foster care is more critical to a successful outcome than the number of placements that the child has while in foster care. Most witnesses agreed that the first four, five or even ten placements (depending on the witness) are not usually harmful. RP 736-37, 1296-98, 1527-28, 2478, 2503.

- The only study on the effects of multiple foster care placements found that some children who enter foster care with no pre-existing problems experience increases in behavioral problems that may be, at least partially, due to multiple placements, but any measurable behavioral change occurs only after five or more placement changes. RC 2474-79.

- A 2001 survey of foster parents and other substitute caregivers related that more than 90 percent of foster children are being placed in safe homes and have their medical, mental health and educational needs met. RP 2036-38, 2398-2400.

- There are no simple or easy answers to resolving the imperfections in the foster care system.

2. The State's Response.

In its defense, the Department introduced some specific examples of improvements made in foster care in recent years:

- There has been a large decline in the number of children who remain in care longer than two years, with only 20 percent of foster children remaining in foster care for more than two years, and only five per-cent for more than four. Ex. 176.

- Adoptions have tripled in the last few years, and long-term guardianships have increased as well. *Id.*

- From 1997 to 2000, the percentage of children with more than ten placements dropped by nearly forty percent. *Id.*

- As a result of the Kids Come First initiative, caseloads have been reduced and funding has increased in several areas, including mental health care, the passport program, and respite care. Ex. 49.

- Other improvements include Kidscreen, a newly implemented assessment program, and the Foster Care Assessment Program ("FCAP"), which targets the children DSHS has had the most difficulty placing. RP 2690-2703.

Unfortunately, the jury was not given the entire picture. It was not allowed to hear testimony proffered by the state about how Washington's foster care system compares with that of other states. RP 1580-87. This evidence was offered not to justify deficiencies or inefficiencies in Washington's child welfare system but to show that this state does not depart from generally accepted professional standards and practices.

Indeed this state exceeds generally accepted standards. For example, through an offer of proof outside the presence of the jury, Dee Wilson, a witness called by the plaintiffs, testified that Washington is doing better than most other states in virtually every aspect of foster care, including average length of stay in care, number of placements, quality of assessment program and amount of money spent on support. *Id*. Similarly, Darlene Flowers, Executive Director of the Foster Parents

Association of Washington, was not allowed to tell the jury that Washington does a better job of supporting foster parents than do most other states. RP 2054-55.

V. SUMMARY OF ARGUMENT

Only one issue remained by the time this case went to the jury – whether plaintiffs' substantive due process rights, under the 14th Amendment, had been violated.

Plaintiffs' counsel and the trial court have created a new constitutional right for children in the class. In doing so, the trial court failed to apply the proper due process analysis, established by the United States Supreme Court, that should be used when recognizing a new substantive due process right based on an asserted liberty interest.

The proper analysis involves three steps. First, the interest must be carefully described. *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997). Second, the liberty interest described must be determined to be a "fundamental" right, entitled to protection under the due process clause. *Glucksberg,* 521 U.S. at 720-21. Third, the court must apply an appropriate culpability standard. Negligence is not enough. *Daniels v. Williams*, 474 U.S. 327, 328, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986). Only the most egregious government conduct, that which is "arbitrary, or conscious shocking, in a constitutional sense," is actionable in a substantive due process challenge. *County of Sacramento v. Lewis*, 523 U.S. 833, 847, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).

In this case the interest asserted was never carefully described. Nor was the interest determined to be a fundamental right. When the plaintiffs changed their theory of the case and abandoned their description of the claim at the close of trial, the trial court skipped to the third step of the due process analysis. The trial court misread the 1982 United States Supreme Court decision in *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed. 2d 28 (1982), confused the culpability standard with the right itself and instructed the jury that the plaintiff class had a substantive due process right "to be treated in a manner which does not substantially depart from professional judgment, standards or practice." CP 751, 751 (Instructions No. 7 and 8). In doing so, the trial court created a constitutional right based on a malpractice standard. This was error and on this ground alone the trial court should be reversed and the case remanded for dismissal of the plaintiffs' action.

Moreover, the trial court erred in entering its injunction. In order for a trial court to enter a mandatory injunction, it must determine that the plaintiffs have (1) a clear legal right, (2) a well-grounded fear of immediate invasion of that right, and (3) the acts complained of are resulting in or will result in actual and substantial harm to the plaintiffs. *King v. Riveland*, 125 Wn.2d 500, 515, 886 P.2d 160 (1994). Additionally, where a systemwide injunction is sought, the plaintiff class must prove actual injury to named plaintiffs and widespread actual injury throughout the system. *Lewis v. Casey*, 518 U.S. 343, 348-49, 116 S.Ct. 2174, 135 L.Ed. 2d 606 (1996).

The jury was empanelled as the finder of fact in this case. It found only past harm and was not specific as to which of the named plaintiffs suffered the harm. (Three of the 10 remaining plaintiffs were adults by the time of trial and had no standing to ask for the injunctive relief.). There was no basis for the trial court to enter the injunction.

Even if a basis for entering the injunction existed, it would not support the audacious order that was entered in this case. The injunction attempts to "solve" all of the problems it perceives in the child welfare system. Under its injunction the trial court would involve itself in the day-to-day decisions of this multi-agency complex system, managing parties and non-parties alike. The injunction would subject the juvenile courts throughout the state, all school districts, the Superintendent of Public Instruction, the public health system, private agencies, foster parents, relatives and biological parents, to its terms. It orders services for children the class, as well as those who are not in the class. Its terms conflict with state and federal legislation. And it orders the appropriation of funds for studies to show the state's compliance with the terms of the injunction. It is, as the order in *Lewis v. Casey* was, "wildly intrusive" and should be reversed.

Additionally, the court made numerous evidentiary and instructional errors and erred when it certified, and again when it failed to narrow, the plaintiff class.

VI. ARGUMENT

A. The Trial Court Misunderstood And Therefore Misapplied Substantive Due Process Jurisprudence.

By the time this case went to the jury only one claim remained—that administration of the foster care system is violating plaintiffs' right to substantive due process under the 14th Amendment. This provision mandates that no state shall "deprive any person of life, liberty, or property, without due process of law." The Amendment "guarantees more than fair process." *Washington v. Glucksberg*, 521 U.S. 702, 719, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997). It also has a substantive component that is implicated when governmental action is alleged to deprive the claimant of fundamental interests in life, liberty or property, regardless of the fairness of the process. *County of Sacramento v. Lewis*, 523 U.S. 833, 840, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).

1. The Trial Court's Analysis of Plaintiffs' Substantive Due Process Claim Was Based on a Flawed Analogy, Was Incomplete and, Therefore, Was Improper.

Analysis of a claim that state action is violating a substantive due process liberty interest involves multiple elements. The first step is to carefully describe the individual interest allegedly subject to due process protection. *Reno v. Flores*, 507 U.S. 292, 302, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993). *See also Sacramento v. Lewis,* 523 U.S. at 841 n.5. The next step is to determine whether the liberty interest so described is a "fundamental right" that is subject to the substantive protections of the due process clause, i.e. whether the interest is one that is "so rooted in the traditions and conscience of our people as to be ranked as fundamental and

implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 721 (internal quotations and citations omitted). When these steps have been accomplished the focus then becomes the standard that is to be used in determining the constitutionality of the government action at issue. *Youngberg v. Romeo*, 457 U.S. 307, 317, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982).

In this case, neither plaintiffs nor the trial court satisfied the first necessary step of proper due process analysis; the fundamental interest that is allegedly subject to constitutional protection was never carefully described. Instead the trial court moved directly to the third step and, using part of the Supreme Court's language in *Youngberg,* instructed the jury that the constitutional *right* at issue was actually the culpability *standard* the *Youngberg* Court used to determine whether a clear liberty interest, raised in a different context, had been violated.

The trial court's interpretation of the decision of the United States Supreme Court in *Youngberg*, and its application in this case was erroneous in two respects: First, the trial court incorrectly confused the standard for determining whether a constitutional right has been violated with the right itself. Second, it equated the transfer of an abused or neglected child's legal custody from the parent to DSHS with the involuntary confinement of an adult in a state mental institution, and concluded the two situations result in the same "massive curtailment of liberty." *See Humphrey v. Cady*, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L.

Ed. 2d 394 (1972); *Parham v. J. R.*, 442 U.S. 584, 622, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1970) (Stewart, J., concurring).

The trial court's interpretation of *Youngberg*, as expressed in Instructions 7 and 8 (CP 751-52), reflects an unorthodox analysis of the substantive due process claim and an interpretation of *Youngberg* that is fundamentally flawed. Had the trial court properly analyzed the interest in this case, it would have rejected the plaintiffs' substantive due process claim. This Court should do so now, and reverse the trial court's decision.

a. The Trial Court Failed to Carefully Describe the Liberty Interest Claimed to be Subject to Substantive Due Process Protection, and Improperly Analogized Foster Care to Involuntary Confinement for Mental Health Treatment.

The Supreme Court approaches cases in which it is asked to recognize new fundamental rights with caution. The Court states that it has

> "always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." By extending constitutional protection to an asserted right or liberty interest, we, to a great extent place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.

Glucksberg, 521 U.S. at 720 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992); citing *Moore v. East Cleveland*, 431 U.S. 494, 502, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977)).

This caution is reflected in the Court's analytical approach in due process cases. The analysis "must begin with a careful description of the asserted right." *Reno v. Flores*, 507 U.S. at 302. The degree of specificity with which the asserted right is described is important and may be determinative of the extent to which the claim of constitutional protection is recognized. *See* Laurence H. Tribe and Michael C. Dorf, *Levels of Generality in the Definition of Rights,* 57 U. Chi. L. Rev. 1057 (1990).

Plaintiffs initially claimed a right to a "permanent and stable home," CP 4142, then later acknowledged that an instruction to that effect would be reversible error. RP 3072. At different times plaintiffs asserted a claim to a certain level of mental health care. *See, e.g.,* CP 784-806 (Plaintiffs' Proposed Jury Instruction No. 8) (constitutional right to mental health treatment that gives plaintiffs a realistic opportunity to be cured). Arguably, by the manner in which they defined the class, plaintiffs suggested that there is a constitutionally protected liberty interest in having no more than two foster care placements. In short, neither the plaintiffs nor the court ever settled on a careful description of the liberty interest of which the plaintiffs claimed they are being deprived. As a result, it was not possible to make a determination whether such interest was one that was fundamental—i.e., deeply rooted in the nation's history and traditions—and thus subject to constitutional protections.

Instead, in the end the plaintiffs seized on language from the *Youngberg* decision and argued that their claim was a right to be treated according to professional judgment, standards, and practices. CP 751; RP

3072-80. This argument, and the instruction that was based on it, reflected a flawed understanding and application of the *Youngberg* decision.

The plaintiff in interest in *Youngberg* was a profoundly mentally retarded man, Nicholas Romeo, who was involuntarily confined in a state mental institution. He was committed as an adult when his mother was no longer able to handle him or his violent behavior. *Youngberg*, 457 U.S. at 310. At the institution Mr. Romeo was physically restrained by staff after he was injured numerous times as a result of his own violence and the reaction of others to him. The state agreed that Mr. Romeo had a right to adequate food, shelter, clothing and medical care. The question before the Supreme Court was whether he had fundamental liberty interests in safety, freedom of movement, and training. *Youngberg,* 457 U.S. at 315.

The Court held that Mr. Romeo had a right to "reasonable conditions of safety and freedom from unreasonable restraints." *Youngberg*, 457 U.S. at 321. With respect to Mr. Romeo's assertion of a right to "minimally adequate" training, the Court declined to find a constitutional right to such training and held, instead, that Mr. Romeo's liberty interests required the state to provide the minimally adequate or reasonable training to ensure his rights to reasonable safety and freedom from undue restraint. *Youngberg*, 457 U.S. at 319. The trial court appears to have accepted the premise that the state's assumption of custody over persons who are involuntarily confined to mental institutions is the same as the state's acceptance of legal "custody" of a dependent child, and concluded that the liberty interests implicated by all "custodial"

relationships involving the state are the same. In making this determination the trial court erred.

The state's relationship with foster children and the state's relationship with individuals confined in its mental institutions or prisons are fundamentally different. The "custody" is different. The purpose of the state's involvement in the individual's life is different. The level and nature of control exercised over the individual is different. The state's ability to fashion a uniformly applicable "statewide" or institutional program for care is different. Because the situations are so different, the Supreme Court's decisions in the prison and institutional cases do not compel the same result.

The state's custody of foster children is not the kind of custody that triggers the rights delineated in *Youngberg*. The "custody" of the plaintiff in *Youngberg* resulted in significant physical restraint and a massive curtailment of his liberty—his right to exist in a free society as a free adult. Children do not have such freedom.

The Supreme Court has distinguished the "custody" of children from the "custody" of persons restrained or confined by the state in at least two decisions.[8] In *Lehman v. Lycoming Cy. Children's Svs. Agency,* 458

[8] In *DeShaney v. Winnebago Cy. Dep't of Soc. Svcs.*, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989), the Supreme Court held that a child does not have a constitutional right to be protected from harm in his own home. The *DeShaney* Court noted that there may be a distinction between children who are served by child welfare systems in their own homes and those who are removed from their homes and placed in foster care. In the latter case, the Court indicated that the situation might be sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect. However, the Court stated that it was expressing "no view on the validity of this analogy . . . as it is not before us in the present case." *DeShaney*, 489 U.S. at 201 n.9.

U.S. 502, 102 S. Ct. 3231, 73 L. Ed. 2d 928 (1982), the Court considered the application of the federal habeas corpus statute to the alleged "involuntary custody" of children in foster care.[9] The mother in *Lehman,* filed the habeas application on behalf of her children who were in the custody of the state and in foster care, as a result of the termination of parental rights. The Court held the habeas remedy was not available to the mother because the meaning of "custody" in the habeas statute did not include a state's custody of dependent children. The Court distinguished "child custody" from those custody cases that involve a "significant restraint" on an individual's liberty. A significant restraint is one that is in addition to those imposed by the state upon the public generally. *Lehman*, 458 U.S. at 509. The Court held that although the children were in foster care, they

> were not in the "custody" of the State in the sense in which that term has been used by this Court in determining the availability of the writ of habeas corpus. *They are in the "custody" of their foster parents in essentially the same way, and to the same extent, other children are in the custody of their natural or adoptive parents.* Their situation in this respect differs little from the situation of other children in the public generally; they suffer no unusual restraints not imposed on other children.

Lehman, 458 U.S. at 510-11 (emphasis added).

Reno v. Flores also distinguishes between "custody" of a child and "custody" of an individual confined in a correctional facility or institution.

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[9] The habeas statute, 28 U.S.C. § 2254(a), is available to anyone filing a habeas application on "behalf of a person in custody pursuant to the judgment of a State court . . . on the ground that he is in custody in violation of the Constitution[.]"

Flores involved a substantive due process challenge to an INS practice of detaining juveniles awaiting deportation proceedings. The juveniles claimed a constitutional right to be released to suitable adults, rather than being held in INS custody. The Court held: "'[L]egal custody' rather than 'detention' more accurately describes the reality of the arrangement . . . since these are not correctional institutions but facilities that meet 'state licensing requirements for the provision of shelter care, foster care, group care, and related services to dependent children.'" *Reno v. Flores*, 507 U.S. at 298 (citation to record omitted).

The purpose of this state's involvement in the lives of dependent children is to protect them from abuse or neglect. RCW 13.34.050. Unlike persons committed to mental institutions, who are committed because they suffer from mental health problems, children are taken into custody because they have been abused, neglected or abandoned, or because their parents are unwilling or incapable of adequately caring for them, such that they are at substantial risk of harm in their parents' care. RCW 13.34.030(5). The infringement of any "liberty" of a foster child who is in the legal custody of the state is no different from the infringement of "liberty" of a child in the legal custody of a parent. Nether child has a right to be free from custodial supervision. Children are always in someone's custody. *Reno v. Flores*, 507 U.S. at 322 (Stevens, J., dissenting).

There is no similarity between the situation of a foster child in the legal custody of DSHS and the situation of a person confined against his

or her will to a mental institution. There is nothing in fact or in law to support, by analogy or otherwise, a recognition of a fundamental liberty interest in foster children which is the same as that afforded adults who are involuntarily confined in a mental institution, and whose freedom to live as others adults in our society has been massively curtailed. Children in the "legal custody" of DSHS do not suffer a curtailment of liberty. Their custody does not involve a significant restraint on their freedom in addition to that experienced by children generally.

b. The Trial Court Misapplied the Supreme Court's Holding in *Youngberg v. Romeo.*

The *Youngberg* Court did not hold that a person confined to a mental institution has a *per se* right to treatment or training. *Youngberg*, 457 U.S. at 318. The Court held the individual

> enjoys constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests.

Youngberg, 457 U.S. at 324.

Having identified the liberty interests at issue—reasonable safety and freedom from unreasonable restraints—as a fundamental right subject to due process protection, the *Youngberg* Court went to the third step of the analysis, and articulated the test for determining whether the state had met its duty to provide Mr. Romeo with minimally adequate or reasonable training necessary to enable him to exercise, to the extent possible, those liberty interests. The *Youngberg* Court held that the culpability standard required the person responsible for determining the level of training

actually provided to Mr. Romeo to exercise professional judgment when so doing.

> [T]he decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is *such a substantial departure* from accepted professional judgment, practice, or standards *as to demonstrate that the person responsible actually did not base the decision on such a judgment.*

Youngberg, 457 U.S. at 323 (emphasis added; footnotes omitted). This standard is consistent with the Supreme Court's recent decision in *Sacramento v. Lewis*, which clarifies that plaintiffs challenging executive actions on substantive due process grounds to prove the actions—at minimum—are "deliberately indifferent" to the rights of individuals. *Sacramento v. Lewis*, 523 U.S. at 851-52.

The trial court ignored the above-quoted language of the Supreme Court, and chose instead to extrapolate a portion of this language and convert it to a statement of the constitutional right itself. In doing so, the trial court essentially created a constitutional right to be free from malpractice, *e.g.,* a right to be treated according to a generally recognized standard of care. The Supreme Court has made it clear that the due process clause is not a "font of tort law to be superimposed upon whatever systems may already be administered by the States." *Sacramento v. Lewis*, 523 U.S. at 848 (quoting *Paul v. Davis*, 424 U.S. 693, 701, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976)). Because the trial court's instructions were based on this flawed interpretation of Supreme Court substantive due

process jurisprudence, the decision below should be vacated, with directions to dismiss the complaint.

2. Even If a Constitutional Right is Found to Exist, No Violation of That Right Was Proved in This Case.

Even if this Court were to recognize a fundamental liberty interest in the plaintiff class, based on the state's acceptance of legal custody and the child's subsequent placement in three homes, the plaintiffs failed to demonstrate any violation of any substantive due process right.

The due process clause does not protect individuals from all conduct of government that may affect a fundamental right. To be actionable the conduct must be so egregious that it "can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." *Sacramento v. Lewis*, 523 U.S. at 847 (quoting *Collins v. Harker Heights*, 503 U.S. at 128). Where deliberative executive action is involved, the *Lewis* Court held the actions of the state must be shown to be deliberately indifferent to the fundamental rights of the individual. *Sacramento v. Lewis*, 523 U.S. at 853. The *Youngberg* standard is no less strict.

Where executive action is challenged as violating substantive due process,

> the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.

Sacramento v. Lewis, 523 U.S. at 847 n.8.

The constitution does not impose liability whenever someone cloaked with authority causes harm.

> [L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process. It is, on the contrary, behavior at the other end of the culpability spectrum that would most probably support a substantive due process claim; conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level.

Sacramento v. Lewis, 523 U.S. at 849 (citing *Daniels v. Williams*, 474 U.S. 327, 328 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986); *Davidson v. Cannon*, 474 U.S. 3444, 106 S. Ct. 668, 88 L. Ed. 2d 677 (1986).

Conduct of an executive must be more than negligent—more than just falling below the acceptable standard of care. It must be deliberate. This culpability standard of deliberate indifference of an executive to the welfare of a person in custody

> rests upon the luxury enjoyed by . . . officials of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations. When such extended opportunities to do better are teamed with protracted failure to even care, indifference is truly shocking.

Sacramento v. Lewis, 523 U.S. at 853.

There was no evidence in this case to indicate, never mind prove, that the Department or any of its officers or employees acted with deliberate indifference to the welfare of foster children or that it made decisions affecting the members of the plaintiff class on a basis other than the professional judgment standard described in *Youngberg.*

No cognizable substantive due process right was alleged or proved by the plaintiffs in this case. The trial court erred in denying the state's motion for summary judgment and, again, in denying the state's motion for judgment as a matter of law at the conclusion of plaintiffs' case. The trial court's decision should be reversed.

B. Trial Court Erred In Entering Its Injunction In This Case

Because no cognizable substantive due process liberty right exists in this case, this Court need not determine whether the trial court committed additional error in entering its injunction. However, if the Court concludes otherwise, the trial court's injunction is erroneous for several additional reasons.

1. The Criteria for Mandatory Injunction Are Stringent.

By the time of trial, the only remedy sought by the plaintiff class was a mandatory injunction.

A trial court's decision to grant an injunction as well as the scope and terms of an injunction are reviewed for abuse of discretion. *Kucera v. Department of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000); *King v. Riveland*, 125 Wn.2d 500, 515, 886 P.2d 160 (1994). A trial court abuses its discretion if its decision is based on untenable grounds or is manifestly unreasonable or is arbitrary. *Kucera*, 140 Wn.2d at 209.

An injunction is justified only if the plaintiffs establish (1) they have a clear legal or equitable right, (2) they have a well-grounded fear of

immediate invasion of that right, and (3) the acts complained of either are resulting in or will result in actual and substantial injury to the plaintiffs. *King v. Riveland*, 125 Wn.2d at 515 (quoting *Tyler Pipe Indus., Inc. v. Department of Rev.*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982)). Additionally, where the trial court is asked to grant system-wide relief based on the violation of a constitutional right, the plaintiffs must prove actual injury to the named plaintiffs *and* widespread actual injury throughout the system. *Lewis v. Casey*, 518 U.S. 343, 348-49, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996).

The failure to establish any one of these criteria requires denial of the request for injunctive relief. *Washington Federation of State Employees v. State*, 99 Wn.2d 878, 888, 665 P.2d 1337 (1983).

If the criteria for an injunction are established, then any injunction issued must be tailored to remedy the specific harms proved, rather than to enjoin all possible breaches of the law. *Kitsap Cy. v. Kev, Inc.*, 106 Wn.2d 135, 143, 720 P.2d 818 (1986). Further, the scope of the relief granted should be consistent with the separation of powers doctrine and the court's role in the political process. The explanation of this principle in the concurring opinion in *Lewis v. Casey* is particularly applicable to the present case:

> I realize that judges, "no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination." But judges occupy a unique and limited role, one that does not allow

> them to substitute their views for those in the executive and legislative branches . . . who have constitutional authority and institutional expertise to make these uniquely nonjudicial decisions and who are ultimately accountable for these decisions. Though the temptation may be great, we must not succumb. The Constitution is not a license for . . . judges to further social policy goals that . . . administrators, in their discretion, have declined to advance.

Lewis v. Casey, 518 U.S. at 388 (Thomas, J., concurring) (quoting *Bell v. Wolfish*, 441 U.S. 520, 562, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979)).

2. Even If the Plaintiffs Had Been Able to Show a Clear Legal Right – A Substantive Due Process Right – the Plaintiff Class Did Not Prove the Remaining Criteria Necessary to Support a Mandatory Injunction.

Assuming that plaintiffs had a constitutional right — a clear legal right — the plaintiffs did not prove a well-grounded fear of immediate invasion of that right and did not prove any violation was then resulting in or would result in actual harm, either individually or system-wide.

Of the 10 class representatives remaining when the case went to trial, three – Amie Anderson, Beth Hardin and Eryk Hardin – were adults and no longer eligible for foster care services.[11] Only seven of the class representatives could *possibly* meet the critical criteria for an injunction by showing (1) they have a well-grounded fear of immediate invasion of a clear legal right and (2) the acts complained of either are resulting in or

[11] The state moved unsuccessfully to dismiss class representatives who were over age 18 and no longer eligible for re-entering foster care, as they did not fit within the definition of the class. CP 3048-52. The trial court erred in denying the motion. CP 2359-61. *Doe v. Spokane & Inland Empire Blood Bank,* 55 Wn. App. 106, 115, 780 P.2d 853 (1989) ("The procedural mechanism of a class action does not confer standing that a plaintiff does not otherwise have in an individual capacity. A class representative, therefore, cannot litigate a claim against a defendant who the representative cannot sue individually." (Citations omitted.)). The three adult plaintiffs had no standing to ask for the mandatory injunction requested in this case.

will result in actual and substantial injury to the plaintiffs. *See King v. Riveland*, 125 Wn.2d at 515.

In this case a jury was empanelled as the finder of fact—not in an advisory capacity. Yet the verdict form asked the jury for a yes or no answer to *only* two questions and the verdict thus reflects only two findings by the jury:

> 1. Were the constitutional rights of the plaintiff class violated?
>
> 2. Was such violation a proximate cause of harm to the plaintiff class in one or more of the ways claimed by the plaintiffs?

CP 738.[12]

These questions ask about past behaviors and about past harms, most which occurred many years ago. The verdict does not include any determination that the plaintiff class faced a current or future risk of harm of any sort. Yet, an injunction requires proof of a material and actual injury that *currently exists or is presently threatened*. *Rumbolz v. Public Util. Dist. No. 1*, 22 Wn. 2d 724, 157 P.2d 927 (1945). The jury found only that plaintiffs' rights were harmed in the past. A mandatory injunction cannot issue to remedy past harm. *Hodgeman v. Olsen*, 86 Wn.

[12] The jury instructions do not delineate the "ways claimed by the plaintiffs." CP 743-58, App. A-14 to A-29. The trial court denied the State's request that the special verdict form ask the jury to determine whether an existing, continuing or threatened actual harm was proved with respect to any of the specifically named plaintiffs. RP 3156-57. Given the questions on the jury form, the jury could have concluded that the only harm suffered by any of the plaintiffs was suffered by the three adult plaintiffs whose harm cannot support the mandatory injunction. The trial court also rejected the state's requests to ask the jury to specifically determine whether widespread, system-wide violations were causing harm to foster children in the class. RP 3164.

615, 623, 150 P. 1122 (1915); *Larsen v. Town of Colton*, 94 Wn. App. 383, 391, 973 P.2d 1066 (1999) ("an action for damages not for an injunction is the proper remedy for injury resulting from past conduct").[13] The purpose of an injunction is to prevent serious actual harm. It is not to protect plaintiffs from speculative or insubstantial injury. *Kucera*, 140 Wn.2d at 221 (quoting *Tyler Pipe Indus.*, 96 Wn.2d at 796).

Where a trial court is asked to grant system-wide relief based on the violation of a constitutional right, the plaintiffs must prove actual injury to the named plaintiffs *and* widespread actual injury throughout the system. *Lewis v. Casey*, 518 U.S. at 348-49. The jury verdict in this case makes no such determination, and does not support the entry of an injunction. The trial court should be reversed on this basis alone.

3. The Trial Court Abused Its Discretion in Entering an Injunction.

The trial court abused its discretion in entering the injunction by purporting to make findings of fact in addition to those made by the jury, that are not supported by the evidence, and that do not meet the standard required for mandatory injunctions. In addition, the trial court erred by entering an order that is overly broad and outside its authority.

a. The Trial Court Abused Its Discretion in Entering Purported Findings.

Although an injunction is an equitable action, and no right to a jury trial exists, the trial court may empanel a jury to determine the factual

[13] The named plaintiffs' individual damage claims were all resolved prior to trial. DSN 303-04.

issues, so long as both parties consent to be bound by the verdict. Such was the case here. CP 266 The jury's verdict, therefore, was to have "the same effect as if trial by jury had been a matter of right." CR 39(c); *Department of Ecology v. Anderson*, 94 Wn.2d 727, 730-31, 620 P.2d 76 (1980).

Nearly six months after the jury rendered its verdict, the trial court made its own "findings" of "areas of practice" that the court believed needed to be addressed "in order to cure the constitutional violations." CP 143, App. A-2. These "areas of practice" are stated as follows:

1. Children are harmed by being subjected to unnecessary multiple placements.

2. Foster parents are inadequately trained, informed and supported to provide proper foster care for children in the class.

3. Children are denied necessary mental health care (assessments and treatment).

4. Children are placed in unsafe placements (DSHS offices, homes of sexual offenders, violent offenders and held in detention/jails).

5. Children are separated from their siblings.

Id.

In this case, as part of the settlement of the tort claims, the parties agreed that the jury would act as the fact finder, providing the basis upon which any equitable decree would be based. CP 266 In making these findings the trial court acted outside its authority and thus abused its discretion. Had the trial court wanted to preserve its right to make its own findings of fact, it would have had to impanel the jury for advisory

purposes only. *State v. State Credit Ass'n, Inc.*, 33 Wn. App. 617, 620, 657 P.2d 327 (1983), *petition for review granted and case remanded*, 102 Wn.2d 1022 (1984).

Even if the trial court had authority to add to the findings made by the jury, the particular findings made by the court, like those of the jury, are insufficient to support an injunction. None of the trial court's purported findings identifies any individual plaintiff being harmed. None speaks to widespread systemic harm. None identifies the constitutional violation that caused the harm.

In *Lewis v. Casey*, the plaintiff class sought widespread system changes. The Supreme Court held, in part: (1) Where a specific constitutional injury is alleged, the relevant actual injury, for purposes of system-wide injunctive relief, is not established by showing that the system is subpar in some theoretical sense. (2) A trial court's finding that only two class representatives suffered actual injury as a result of the constitutional problems identified in the system does not support a system-wide injunction. *Lewis v. Casey*, 518 U.S. at 350-51.

Neither the jury verdict nor the trial court's "findings" in this case find actual harm to any of the named plaintiffs or to the class as a whole. The injury element necessary for injunctive relief is satisfied only if the challenged action is causing or will cause specific and perceptible harm. *Kucera*, 140 Wn.2d at 213. Here, the findings are purely speculative.

Furthermore, the trial court's findings are not supported by the evidence or by the jury verdict.

First, the trial court's "finding" that children are harmed by unnecessary multiple placements may be true in a theoretical sense for some children; however, the evidence does not suggest it is true for all children, or even a majority, who have multiple placements. *See e.g.,* RP 2503. And none of the placements described in this case was proved *unnecessary*.

Second, there is no evidence to support the "finding" that foster parents are not adequately trained or informed or offered support to care for children who have high needs or multiple needs. Instead, the evidence was that Washington provides foster care training and support that is among the very best in the nation. RP 2053-55. Additional training may be helpful in dealing with special needs children, but there is no evidence that any of the children in the class were actually harmed by inadequate training of foster parents.

Third, there is no evidence that any of the named plaintiffs, or other members of the class, are denied mental health care. To the contrary, the evidence showed that all of the named plaintiffs received extensive mental health treatment while they were in foster care.[14] *See, e.g.,* RP 1113.

[14] In *In the Matter of the Detention of J.S.*, 124 Wn.2d 689, 700, 880 P.2d 976 (1994) this Court held even patients in a mental institution do not have a constitutional right to a particular level of treatment or care. ("[T]he constitutionally significant issue is *not whether the optimal course of treatment must be followed*, but whether a course of treatment is adequate and reasonably based on professional judgment.")

Fourth, there is no evidence that any child in the class was ever knowingly placed in a home with a sexual offender or a violent offender.[15] Nor is there evidence that permitting children to stay overnight in a DSHS office or that juvenile court ordered placement in a detention facility is occurring, is widespread, or is resulting in actual harm.

Fifth, the trial court's "finding" that children are separated from their siblings is not supported by the evidence with respect to the named plaintiffs or the class in general.[16] No harm was shown by the named plaintiffs because of separation of siblings.

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[15] The trial court conditionally granted the Department's motion in limine to exclude evidence or argument suggesting the Department was liable for any abuse foster children experience in foster care. The trial court agreed the evidence could be heard by the jury, but held it would be subject to a limiting instruction. RP 118-26; RP 217-18. The issue arose prior to the testimony of Ivory Hardin, who was allegedly raped while she was in foster care. RP 767-91. Just before the testimony was given, the trial court orally gave the jury the following limiting instruction:

> You are about to hear evidence of sexual assault to a foster child in state care. There should be no conclusion by you that the defendants were actors who directly caused harm to these children. Foster parents are independent contractors who are legally responsible for the safety of foster children. This evidence may be considered by you only as it may inform you of the witness's history or as it may inform you as to other issues in the trial such as the quality of foster care families.

RP 798-99. This was the only evidence of an assault of a named plaintiff in foster care. Based on this limiting instruction, neither the jury nor the trial court could have found current actual harm suffered as a result of a constitutional violation.

[16] The named plaintiffs who have siblings were either placed together or were separated for safety or other valid reasons. With minor, short-term exceptions, the four Hardin children were kept together from their entry into foster care until they were adopted. RP 875-76. The Bursch sisters never lived apart. RP 2297-2300. Amie Anderson was initially separated from her brother because he continued to live with the children's biological father, who had sexually abused Amie, and then because he moved away. RP 423-46. Timothy Olson was separated from his half-brother because the brother was abusive to Timothy and posed a danger to him. Additionally, the brother lived with his own father, a man who was not related to Timothy. Ex. 252.

None of the trial court's findings are supported by the jury's verdict or the evidence.

b. The Trial Court Abused Its Discretion in Entering an Injunction That is Overly Broad.

A trial court abuses its discretion if it grants an injunctive remedy beyond that which is necessary to provide relief to the plaintiffs who are being harmed. Absent actual present harm, the trial court was without authority to enter an injunction to cure perceived "inadequacies" in the child welfare system. In *Lewis v. Casey,* the Supreme Court explained that the actual-injury requirement serves the purpose of preventing courts from assuming responsibilities assigned to the political branches of government, thus observing the constitutional requirements for separation of power between the three branches of government. This purpose would not be served

> if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration. The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established.

Lewis v. Casey, 518 U.S. at 357 (emphasis in original).

In reversing what it termed an "inordinately—indeed, wildly—intrusive" injunction, the Supreme Court said, "One need only read the order to appreciate that it is the *ne plus ultra* of what our opinions have lamented" as a court's becoming enmeshed in the minutiae of an

administrative agency's operations in the name of the Constitution. *Lewis v. Casey*, 518 U.S. at 362.

In the name of an ill-defined constitutional right, the trial court has attempted to "solve" the problems of child welfare in Washington by involving itself in the minute operations of a complex, multi-agency system. The system and those who the trial court would manage or monitor under this injunction include not only the Department of Social and Health Services, but non-parties as well. The juvenile courts in all 39 counties, all 296 school districts in the state, the Superintendent of Public Instruction, the public mental health system (both local and state), and the parents of children involved with this system are all subject to the trial court's injunction. The injunction mandates relief for children who are not members of the class. It contains provisions that directly conflict with statutory mandates. It ignores legislative actions, such as the approval to proceed with accreditation under the standards set by the Council on Accreditation (rather than those of the Whatcom County Superior Court). *See* RCW 74.13.017. And it requires the Legislature to appropriate funds for the benefit of a subgroup of foster children—without regard to budgetary restraints, without consideration of the needs of all foster children and without consideration of the competing needs of other Washington residents.

The fundamental errors in the trial court's injunction are described below in the context of the trial court's mandatory five-part order.

(1) Stability of placements.

The Plaintiffs conceded at trial that a foster child has no constitutional right to stability of placement. RP 3072-75. Nonetheless, the trial court ordered the following steps be taken to remedy this "problem."

- The Department is to license 500 additional foster homes within the next seven months, with the majority of these homes "licensed for and capable of providing therapeutic foster care."

This directive conflicts with RCW 74.13.031(2), directing the Department to "[w]ithin available resources, recruit an adequate number of . . . foster homes, both regular and specialized . . . and annually report to the governor and the legislature concerning the department's success[.]" Additionally, there is no policy or licensing category that defines "therapeutic foster care." If the Department fails to meet this deadline, then it is to rent and staff its own residential homes for children. Such a provision appears to require professional foster care "institutions" or a return to orphanages.

- The Department is ordered to provide notice prior to moving a child to a new placement.

This provision was included even though the plaintiff's procedural due process claims were dismissed by the trial court on summary judgment. CP 3053. There is no factual or legal basis for this provision.

- Within two weeks of a child's third placement the child is to be assessed by a team of "medical and mental health practitioners, foster parents, school officials, etc." to develop a comprehensive plan for the child.

This order improperly interferes with comprehensive requirements established by the Legislature for assessing the health needs of foster children, RCW 74.14A.050, and requires the "team" be made up of persons who were not parties to the action, who are not bound by the order and over whom the Department has no authority.

- The Department is ordered to collaborate with the Superintendent of Public Instruction, school districts, and other relevant educational institutions to "increase the supports available to foster children in the educational system."

This section of the order is unrelated to any constitutional violation or actual harm proved. It further requires collaboration with non-parties, and is so vague that it is unenforceable.

- The Department is ordered to provide "immediate and child-friendly transportation arrangements" for those children who change schools because of their foster care placement.

This requirement again does not relate to any right alleged or proved by the plaintiff class. Foster children have no constitutional right to "busing." Moreover, this section of the order requires school districts, who are not parties to this lawsuit, to communicate with each other regarding foster children moving from one school to the other. The provision also conflicts with legislation in effect prior to the court's injunction. Laws of 2002, ch. 326 (requiring DSHS to develop a plan for presentation to the Legislature for addressing education stability of foster children and implementing pilot projects).

(2) Training, information and support for foster parents and children.

Despite the fact that the jury did not find that children are currently suffering actual harm based on a "right" to be placed with highly trained caregivers, the trial court ordered the following:

- The Department is to provide additional and specified training for foster parents.

The training ordered by the trial court differs from the statutorily mandated training currently provided under RCW 74.13.250. *See also* RCW 74.13.310 and RCW 74.14B.020.

- The Department is ordered to provide each foster parent with the child's complete DSHS file as well as other information prior to placement.

This requirement conflicts with current statutes and with the privacy rights of the child's parents. Current law requires the Department to share information about the child and the child's family with foster parents and to provide a Passport, containing medical and educational information about the child. The injunction conflicts with the Legislature's directive with respect to the method for implementing the Passport Program. RCW 74.13.280. *See also* RCW 13.34.350. The child's DSHS case file often contains extensive personal and private information about the child's parents and others. To the extent it is pertinent to the child's care, it is already required to be provided to foster parents. RCW 74.13.280. Otherwise, this information is protected from disclosure by federal and state laws governing drug, alcohol, medical and

mental health records and treatment, and by RCW 13.50.100. *See e.g.,* RCW 70.96A.150 (confidentiality of substance abuse treatment records); RCW 71.05.620 (confidentiality of mental health records); RCW 74.04.060 (records and files of applicants and recipients of services administered by DSHS are confidential and privileged).

- The Defendant is required to implement a system of "respite" or relief care for foster parents.

Respite care is currently authorized by statute. RCW 74.13.270. Under existing department policy foster parents are guaranteed two days of respite care per month. The order is not based on any alleged constitutional violation or any evidence of actual harm.

- The Department is ordered to "make substantial efforts to increase kinship foster care," using family group conferencing and increased staff training regarding the importance of kinship care. The Department is ordered to report its progress to the Whatcom County trial court within 180 days.

There is no evidence that any child in the class is being harmed by not being in a relative placement. Further, the order conflicts with legislation mandating that the Department convene a workgroup to develop a comprehensive plan for kinship care and to present the plan to the 2003 Legislature. Laws of 2002, ch. 144.

(3) Mental and physical health.

There was no finding, or evidence to support a finding, that any of the named plaintiffs was ever denied mental health care. Nevertheless, the trial court ordered:

- The Department must provide physical and mental health assessments "by licensed mental health professionals" of each child "within 30 days of each child's entry into the foster care system" and shall provide care for needs identified in the assessments within 60 days of the assessment.

This provision of the injunction requires action toward children who are not in the plaintiff class, and is therefore beyond the authority of the trial court. This provision also conflicts with the specific requirements of RCW 74.14A.050 (Kidscreen), which does not require the assessment be completed by a mental health professional. The injunction further requires the Department to assure care by persons who have their own scheduling priorities and who are not under the Department's control.

- In providing mental health assessments and treatment, the Department is ordered to follow certain principles, including: "collaboration with child and family, functional outcomes, collaboration with others, accessible services, best practices, and independence. The treatment shall give the foster child "a realistic opportunity to be cured."

This provision is not supported by any evidence of actual harm to an individual or to class members throughout the system. It also is so vague that it is unenforceable.

(4) Unsafe placements.

The Plaintiffs conceded at the close of testimony that there is no constitutional right to safe, stable and permanent homes. RP 3072. There was no testimony that any of the named plaintiffs are in unsafe homes and there was none that there are widespread safety issues in the state's foster care system. The trial court nonetheless ordered the Department to cease

holding children in unsafe and "clearly inappropriate" placements, including placement in DSHS offices or detention centers and jails, or in homes with sexually aggressive or violent children. There was no evidence of any current widespread practice or of actual harm resulting from a child staying overnight in a DSHS office.[17] There was no admissible evidence that dependent children are currently being held in detention facilities once they are no longer subject to detention.[18] There was no evidence that any child in the class is currently (or was in the past) knowingly placed in a home with a sexual offender or with a violent offender. Further this part of the order is overbroad in that it fails to recognize that there are safety measures that can be taken in any home to protect a child. RP 2773-74.

(5) Separation of siblings.

There was no evidence of any unnecessary separation of siblings in this case and no evidence of any actual harm due to such separation. Nonetheless, the trial court decided that there is "a strong presumption favoring preservation of relationships among siblings by placing them in the same foster home unless one sibling poses a danger to another."

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[17] There was testimony that infrequently, and only in Seattle, teenagers who ran from placements or who had conflicts with parents late at night, have stayed overnight in the DSHS office. RP 2769. There was no testimony that this was a widespread practice or that it caused harm. *See, e.g.,* RP 2771.

[18] The only testimony about any child being placed in detention was hearsay evidence, based on statements from the Ombudsman's report, Ex. 173. The statement was that youths who had committed offenses "have been kept or placed by the court" in detention facilities for lack of an available or appropriate placement. RP 1678. There was no evidence of any particular child or of any particular incident in which a child had experienced such a placement.

- The injunction provides that the state shall not separate siblings who are in foster care unless one sibling poses a danger to another and the state must have compelling reasons to separate siblings for more than one week. If separation is necessary, the state is to arrange for continuing face-to-face and telephone contact.

This provision directly conflicts with the language of RCW 13.34.130, as amended by Laws of 2002, ch. 52 § 5, which requires juvenile courts to consider whether it is in the best interests of dependent children to maintain contact with their siblings and, in those proceedings, to order contact, provided the court has jurisdiction of all siblings. There is a significant difference between the injunction's requirement of a finding that a child will pose a danger to a sibling and the statutorily required finding that it is in the child's best interest to have contact that is fashioned to fit the child's individual needs. Written or e-mail contact, without face-to-face visits or telephone conversations, may be most appropriate in some cases. The Whatcom County judge's order removes this decision from the local juvenile court judge or commissioner who has knowledge of the particular case and who is in the best position to determine the interests of the child.[19]

(6) Monitoring Compliance.

The trial court's order goes on to require the Department to hire an independent evaluator to annually determine compliance with certain of

[19] The trial court's order narrowly defines sibling as a biological or step-sibling, CP 144, App. A-3. This definition excludes adoptive siblings as well as other familial arrangements where children, who may or may not be biologically or legally related, reside in the same household as part of a family unit. This is but another example of why child welfare systems should not be managed by a single trial judge's injunctive order.

the mandates contained in the injunction. It also requires the Department to "make all records and files of individual foster children available for such independent study." And it provides "[t]he studies will be made at the State's expense." *Id.*

This provision requires the Department to violate RCW 13.50.100, which protects the confidentiality of children's records, as well as federal law. 42 U.S.C. § 671(a)(8). The records and files of foster children contain extensive information about the medical, mental health, drug, alcohol, criminal history of the child, the child's siblings, relatives and parents. Further, the trial court in Whatcom County is ordering the State of Washington to appropriate funds for an independent study. This order is beyond the trial judge's authority. *Panell v. Thompson*, 91 Wn.2d. 591, 598-99, 589 P.2d 1235 (1979).

Although the Plaintiffs did not allege or prove that safety and security risks existed, the trial court's order provides:

- "Because of the imminent risks to a child's safety and security and the possible need for immediate intervention, the defendants shall maintain a central record . . . of every allegation that a foster child has been molested, assaulted or sexually assaulted in a foster home or has been placed in a placement which does not comply with the provisions of this order. These records shall be available to plaintiffs' counsel."

CP 152, App. A-11.

There is no evidence to support the entry of this provision. Further, the provision assumes oversight over decisions made by the juvenile court with jurisdiction over the child. It requires the defendants to "provide counsel for the plaintiff class with *all documents that tend to*

show, directly or indirectly*, compliance or noncompliance* with any provision of this order." CP 153, App. A-12 (emphasis added). It also requires the release of confidential information to plaintiffs' counsel, in violation of RCW 13.50.100, so that plaintiffs' counsel can monitor—no doubt at state expense—the Department's, Legislature's, the juvenile courts', schools', private and community service providers' and community mental health systems' compliance with the Whatcom County Superior Court order.

The injunction is far beyond what is necessary to remedy any actual present or threatened injury—even if a clear legal right did exist. It is a staggering example of unjustified and untempered judicial interference into the legislative, administrative and judicial processes. It is a clear example of abuse of judicial discretion and, accordingly, should be reversed.

C. The Trial Court Committed Fundamental Errors In Ruling On The Admissibility of Evidence And In Instructing The Jury.

Although the Court need not and should not reach them in order to reverse the judgment, the trial court committed key evidentiary and instructional errors that are discussed below.

1. Evidentiary Errors.

a. The Trial Court Erred in Permitting the Plaintiffs to Present Evidence to the Jury of Past Inadequacies of the State's Child Welfare System When Those Inadequacies Could Not Be Remedied by Injunction.

By the time this case went to trial, the sole remaining claim was for prospective injunctive relief. The issue, therefore, was whether the state was *currently* violating the plaintiff class' substantive due process rights and whether any violation was *currently* causing harm sufficient to justify entry of a mandatory injunction. *Kucera, supra; Tyler Pipe, supra.*

The state moved unsuccessfully to exclude dated evidence of past inadequacies in the child welfare system, past violations and past harm as irrelevant and misleading to a jury empanelled to find whether facts existed upon which a prospective injunction could be based. RP 1996. *See* ER 401 and 403; *Rumbolz v. Pacific Util. Dist.*, 22 Wn. 2d 724. The trial court erroneously permitted the jury to base its findings on evidence dating back to the time when the class representatives entered foster care in the 1980s. RP 140-42, 570-78, 1576-79, 1633, 1662-64, 1996.

If this case is remanded, the evidence should be limited to showing current constitutional violations and current harm caused by existing programs and practices of Washington's child welfare system.

b. The Trial Court Erred in Precluding Evidence of Other States' Practices and Standards.

The trial court instructed the jury that foster children who have been placed in three homes have a constitutional substantive due process right "to be treated in a manner which does not substantially depart from

professional judgment, standards or practice." CP 757, App. A-22. The term "professional judgment, standards or practice" was never defined for the jury. The trial court prohibited the state from offering evidence that Washington meets or exceeds the practices of foster care systems in other states. RP 170-73.

The state made several offers of proof, outside the jury's presence, establishing Washington's foster care system meets or exceeds other states' delivery of foster care services. *See, e.g.*, RP 1580-87, 2054-55, 2457-59, 2766-68. Washington's foster parent training is considered among the best in the nation, RP 2054, but the jury was not permitted to hear that fact. Nor did the jury hear that Washington's foster care system also is ranked in the top 25 percent in the country overall. This ranking considers the areas of length of stay in foster care, numbers of children adopted, and systemic reduction of multiple foster care placements. RP 1581-82, 2766-68.

The purpose of the offered evidence was not to justify or excuse inadequacies in the system, but to show that professional standards applied by all states administering foster care were met or exceeded by the State of Washington. The fact that a practice is followed by a large number of states is "plainly worth considering" in determining whether a substantive due process right exists and whether it has been violated. *See, e.g., Schall v. Martin*, 467 U.S. 253, 268, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984). The trial court erred in excluding this evidence.

c. The Trial Court Erred in Admitting Evidence of Child Welfare League Of America "Best Practices" and Pediatrician's Standards.

While rejecting evidence of practices actually used by states in providing foster care services, the trial court permitted the plaintiff class to offer evidence of ideals and aspirational goals of the Child Welfare League of America's (CWLA) for providing foster care. Although the jury was permitted to hear no state in the nation meets the ideals set by CWLA, plaintiffs were repeatedly allowed to infer that the CWLA goals set the minimum standards for the provision of foster care services. *See, e.g.*, RP 751-53, 1400-02, 1458, 1472-73, 1502-04, 1533, 1600-04, 3022. In fact, these are not the standards that Washington is adopting as part of its accreditation of this state's child welfare system. RP 2676-79; RCW 74.13.013.

Additionally, the plaintiff class was permitted to adduce opinions that various state statutes, regulations, and policies, which currently set the standards for Washington, were not being perfectly complied with in all instances. *See, e.g.*, RP 2362-67. This was so even though all of the plaintiffs' claims based on statutory violations were dismissed. And the trial court permitted the plaintiffs to ask witnesses whether it was their opinion that various alleged practices of the State of Washington violated some undefined standard of care—even though these witnesses acknowledged their opinions were not based on written or accepted "professional standards." *See, e.g.*, RP 1707-09.

The plaintiff class also was allowed to ask a physician to describe American Academy of Pediatrics policies, purporting to establish the professional standards of practice for pediatricians providing care to foster children. RP 2197-203, 2208-211, 2229, 2234-37, 2239-49. The physician was then erroneously permitted to give his opinion, that Washington's foster care system substantially departed from pediatricians' recommended standards of care. RP 2248-49, 2261.

The undisputed testimony, however, is that there are no generally accepted standards adopted by Washington or uniformly applied or followed by any state foster care system. RP 3048.

d. The Trial Court Erred in Limiting Evidence of Fiscal Constraints.

The trial court prohibited the state from presenting evidence of fiscal considerations and constraints during its case-in-chief. CP 845-47. The court ruled that evidence of the Department's efforts to obtain additional funding for foster care programs from the Legislature and other "funding details," such as competing budgetary priorities, were inadmissible "character" evidence. *Id.* The court limited fiscal evidence to testimony about how a lack of resources "affects the State's exercise of professional judgment in a particular activity." *Id.* This ruling prevented the Department from proving that professional judgment was exercised, in part, by proposing foster care reforms, and requesting enhanced funding for those programs. *See In the Matter of the Detention of J.S.*, 124 Wn.2d 689, 700, 880 P.2d 976 (1994) (a reasonable consideration of whether

professional judgment has been exercised must necessarily incorporate a cost analysis.) The Department must act according to legislative mandate and, in using professional judgment, its administrators must prioritize the Department's actions based on available funds and the conflicting concerns of all of the children and other vulnerable clients it serves. *See Hillis v. Department of Ecology*, 131 Wn.2d 373, 391, 932 P.2d 139 (1997); *In the Matter of the Detention of J.S.*, 124 Wn.2d at 700.

e. The Trial Court Erred in Admitting Testimony on the Annual Reports of the Office of Family and Children's Ombudsman.

Over the objection of the Department, the plaintiff class repeatedly used hearsay statements in reports of the Office of Family and Children's Ombudsman, Exs. 173, 174, to improperly infer that the State of Washington admitted to violating foster children's rights and causing them harm. *See, e.g.*, RP 1480-86, 1612-13, 1658-60, 1675-80, 2249-57, 2931-33.

The Ombudsman's office was created by the Legislature in 1996

> for the purpose of promoting public awareness and understanding of family and children services, *identifying system issues and responses for the governor and the legislature to act upon*, and monitoring and ensuring compliance with administrative acts, relevant statutes, rules, and policies pertaining to family and children's services and the placement, supervision, and treatment of children in the state's care or in state-licensed facilities or residences.

RCW 43.06A.010 (emphasis added).

The Ombudsman's annual reports are used to assist the executive and legislative branches of government in making improvements to the

child welfare system. RCW 43.06A.030. The Ombudsman cannot be called to testify regarding an investigation and its reports and records are exempt from discovery and from use as evidence in any legal proceeding. RCW 43.06A.060 provides:

> Neither the ombudsman nor the ombudsman's staff may be compelled, in any judicial or administrative proceeding, to testify or to produce evidence regarding the exercise of the official duties of the ombudsman or of the ombudsman's staff. All related memoranda, work product, notes, and case files of the ombudsman's office are confidential, are not subject to discovery, judicial or administrative subpoena, or other method of legal compulsion, and are not admissible in evidence in a judicial or administrative proceeding. . . .

In this case the Ombudsman's 1999 report was the sole source of evidence that, pursuant to juvenile court orders, a few foster children allegedly remained in juvenile detention beyond their release dates due to a lack of an appropriate and available placement. Ex. 173. In addition the report is hearsay, is non-specific and does not discuss harm. The trial court erred in allowing the hearsay statements from these reports to be considered by the jury.

2. Instructional Errors.

As explained above, the trial court and plaintiffs erroneously created a constitutional right involved, failed to accurately explain the proper culpability standard, failed to require findings of present or threatened harm, and failed to have the jury determine whether any harm was suffered by the named plaintiffs. This Court recently held:

> "Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when

> read as a whole properly inform the trier of fact of the applicable law." Even if an instruction is misleading, it will not be reversed unless prejudice is shown. A clear misstatement of the law, however, is presumed to be prejudicial.

Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002) (citations omitted); *see also Oregon Mut. Ins. Co. v. Barton,* 109 Wn. App. 405, 412-13, 36 P.3d 1065 (2001).

Jury instructions are reviewed *de novo*. *Barton*, 109 Wn. App. at 412. Here, as described above, the instructions misstate the law (Instructions 7, 8, 9 and 10, CP 751-54, App. A-22 to A-25), both with respect to describing the alleged constitutional right, with respect to defining the standard of culpability, and with respect to a finding of current or future harm. (Instructions 8 and 12, CP 751, 756, App. A-22 and A-27, and jury verdict form, CP 738, App. A-30.) The instructions are presumptively prejudicial and are, in fact, prejudicial to the Department.

D. The Trial Court Erred in Initially Certifying the Class, and in Subsequently Refusing to Redefine the Class to Conform to the Evidence and Claim Presented.

For reasons previously expressed the judgment below should be reversed and the plaintiffs' constitutional claim should be dismissed. However, if the Court somehow concludes otherwise, then it is necessary for the Court to determine whether the trial court erred in its certification of the class.

A trial court's decision to certify a class is reviewed for abuse of discretion. *Oda v. State*, 111 Wn. App. 79, 90, 44 P.3d 8 (2002) (citing

Eriks v. Denver, 118 Wn.2d 451, 466, 824 P.2d 1207 (1992)). While the "class action device [is] capable of the fair and efficient adjudication of a large number of claims, [it] is also susceptible to abuse and carries with it certain inherent structural risks." *Pickett v. Holland America Line-Westours, Inc.,* 145 Wn.2d 178, 187, 35 P.3d 351 (2001). For that reason, a trial court should certify a class only after rigorous analysis, to ensure that all of the requirements for certification have been met. *Oda*, 111 Wn. App. at 93 (citing *General Telephone Co. v. Falcon*, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)). Class actions requesting injunctive relief are governed by CR 23(a) and (b)(2). *King v. Riveland*, 125 Wn.2d at 518. In addition to alleging a claim for injunctive relief under CR 23(b)(2), plaintiffs must show that each of the requirements of CR 23(a) exists: (1) The class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims of the representative parties are typical of the claims of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. *Oda*, 111 Wn. App. at 89.

In this case the trial court certified a class of foster children who have or will be in three placements. DSN 202. This certification was made without identifying the legal issue purported to be "common" to all members of the class and without determining whether the named plaintiffs were representative of the class. Absent a defined common legal claim, the trial court could not properly determine that the requirements necessary for certification were met.

While complete unanimity in questions of law or claims is not required, *King v. Riveland*, 125 Wn.2d at 519, certainly a clear identification of the legal claims and similarity between the claims of the named plaintiffs and those of the requested class is essential for any reasoned analysis of a request for certification. Indeed, the court "must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." *Oda*, 111 Wn. App. at 94 (quoting *Castano v. American Tobacco Co.,* 84 F.3d 734, 744 (5th Cir. 1996)).

The questions of law and fact that the plaintiffs alleged to be common to the class were ill-defined initially, and changed significantly during trial.[20] The trial court in the present case did not understand the nature of the plaintiffs' substantive due process claim until after all of the evidence was in. The trial court did not understand the factual basis for the claims of children in the proposed class. Such an understanding is necessary to determine whether there is any similarity between the claims of the named plaintiffs and those of the class members, and thus, whether the class should be certified. Further, the evidence presented by the plaintiffs' experts at the time of certification and at trial showed that any harm suffered by children in the class could not be related based solely on whether the child experienced three or more placements.

[20] As previously noted, plaintiffs abandoned any constitutional claim to a safe, stable and permanent home at the end of the trial and substituted for it a claimed constitutional right to the exercise of professional judgment. RP 3072-99.

What the trial court did understand, once trial was underway, was that the class was defined too broadly. ("Clearly, the Court is not going to articulate in any injunctive relief, something based on as low a standard as three or more placements." RP 1888.) However, the trial court refused defendants' request to revise the class definition to comport with the evidence at trial. CP 621-30.

A trial court has a duty to reevaluate class certification throughout all stages of litigation. *See, e.g., Burns v. United States R.R. Retirement Bd.*, 701 F.2d 189, 192 (D.C. Cir. 1983); *Boucher v. Syracuse Univ.*, 164 F.3d 113, 118 (2d Cir. 1999). As the trial progressed, it became increasingly clear that the class certified was so large—estimated to be about 3,600 children—that it included many children who do very well in foster care, and was inappropriate. Even plaintiffs' own witnesses, Jean Soliz, Dee Wilson, Dr. John Landsverk, and Dr. Eric Trupin, testified that the class, as defined by the trial court, included thousands of children for whom the foster care system works well and that it is a relatively small group of children, far narrower than the class that was originally certified, who are not well served by the system as it exists. RP 1297-98, 2478.

Dr. Trupin testified that the "core problem" with Washington's foster care system is limited to approximately 300 children. and that the number of placements isn't the critical issue. RP 1297-98. In his view, the length of the child's stay in foster care and the severity of his or her behavioral problems, which generally go hand in hand, are more important indicators of problem areas in the foster care system. RP 1296-98.

Similarly, former Secretary Soliz testified that the problems in the system affect a "relatively small group" of foster children and that this group consists of children who remain in foster care "for a long time." RP 736-37.

Mr. Wilson testified that, even in an ideal foster care system, a child would likely have a minimum of three placements (a receiving home, a foster home, and lastly, an adoptive home). RP 1527. He testified that the example of a child who has only three placements is an example of the system working well. RP 1527-28.

Dr. Landsverk testified that children "appear to be able to tolerate under five placement changes without it resulting in greatly increased . . . behavior problems," and that five placements was the "critical period." RP 2478. Landsverk also testified that children who enter foster care with severe behavior problems do not appear to be further harmed by multiple placements. RP 2503.

The testimony of the plaintiffs' own witnesses shows that the class definition was far too broad for two reasons: (1) it includes children with as few as three placements, a number which no witness testified was harmful; and (2) it has no temporal limitation, even though the witnesses agreed that the length of time a child remains in foster care may be the single most important factor. As certified by the trial court, the class erroneously includes every child who has been placed three or more times, regardless of their mental health, emotional state, or length of time in the foster care system.

The trial court thus erred in defining the class originally and in refusing to revise the class definition to—at the very least—comport with the testimony of plaintiffs' own witnesses.

VII. CONCLUSION

The Department respectfully submits this Court should reverse the trial court's injunction and dismiss the constitutional claim of the plaintiff class.

DATED this 12th day of August, 2002.

Respectfully submitted,

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